

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

<b>SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 500</b>	)	
	)	
<b>Petitioner,</b>	)	<b>Case No.: 05-RC-139478</b>
	)	
<b>And</b>	)	
	)	
<b>GOUCHER COLLEGE,</b>	)	
	)	
<b>Employer.</b>	)	

**EMPLOYER’S BRIEF IN SUPPORT OF ITS EXCEPTIONS  
TO REPORT OF THE HEARING OFFICER ON CHALLENGES**

Pursuant to Section 102.69 of the Rules and Regulations of the Board, Goucher College (“Goucher” or “the Employer”), hereby files this brief in support of its Exceptions to the Hearing Officer’s Report on Challenges (“Report”).

**I. PROCEDURAL HISTORY**

The Petition in this case was filed on October 23, 2014, by the Service Employees International Union, Local 500 (“the Union”). Pursuant to a Stipulated Election Agreement between the Employer and Union, an election was conducted by mail ballot. The stipulated unit was as follows:

All full-time, part-time and half-time non-tenure and non-tenure track faculty employed by Goucher College to teach at least one credit-bearing classes[sic], lessons or labs (including but not limited to Post-Doctoral Teaching Fellows) on its campus located at 1021 Dulaney Valley Road, Baltimore, Maryland 21204; but excluding all graduate and post-graduate faculty and teaching fellows, all faculty in the Welch Graduate Studies Center, all tenure and tenure-track faculty, all other employees whether or not they have teaching responsibilities, including but not limited to program directors, department chairs, graduate students, teaching associates, teaching assistants, librarians, registrars, deans, provosts,

administrators, coaches, office clerical employees, managers, confidential employees, guards and supervisors as defined in the Act.

Ballots were mailed to voters on November 25, 2014. On December 9, 2014, the ballots were counted at the Board's offices in Baltimore, Maryland. Of the ballots counted that day, 33 votes were cast for the Union, 33 votes were cast against representation, and 12 ballots were challenged. The Union challenged three ballots; the remaining challenges were raised by Goucher. All of Goucher's challenges were raised on the same basis: the challenged voters were visiting professors and/or leave replacement faculty whose end dates of employment were ascertainable and firm at the inception of their employment. Thus, under the Board's long-standing precedent, they are temporary employees and lack a community of interest with the voters in the stipulated bargaining unit.

Goucher unilaterally withdrew two of its challenges (to the ballots of Chelsea Schields and Maureen Winter). On December 24, 2014, Charles L. Posner, Regional Director, Region 5, issued a Report on Challenges and ordered a hearing on the remaining 10 challenges. That hearing was held at Region 5's offices in Baltimore on January 6, 2015. Both parties were represented by counsel and given an opportunity to present witnesses, introduce evidence, and cross-examine witnesses presented by the other party. Both parties filed post-hearing briefs in support of their positions on the challenged ballots.

On January 27, 2015, Hearing Officer Rachel R. Babale issued a Report on Challenges,<sup>1</sup> in which she correctly recommended that the challenges raised by the Union (to the ballots of Esther Gibbs, Carol Mills, and Barbara Roswell) be overruled and that those individuals' ballots be opened and counted. (R., pp. 5-7). The Hearing Officer also correctly sustained Goucher's

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<sup>1</sup> Throughout this Brief, references to the Hearing Officer's report will be referred to as (R., p. \_\_); references to the transcript will be referred to as (Tr., p. \_\_); Employer Exhibits will be referred to as (Empl. Exh. \_\_); and Union Exhibits will be referred to as (U. Exh. \_\_).

challenges to the ballots of Sinan Ozdemir and Michelle Prince. (R., p. 12). However, the Hearing Officer erred when she recommended that Goucher's challenges to the ballots of Joseph Briggs, Jeffrey Dowd, Madeline Fairbairn, Daniel Kimball and Jay Thompson be overruled. As established by the testimony and documentary evidence adduced by Goucher at the hearing, all of those individuals were visiting faculty and/or were otherwise temporary employees whose employment had an ascertainable end date at the inception of employment (and well before the Petition in this case was filed on October 23, 2014). In fact, none of these temporary employees has any community of interest with the employees in the bargaining unit, who have been employed year after year with an expectation of reappointment.

## **II. BACKGROUND FACTS AND GOUCHER'S OPERATION**

Goucher is a private college with a campus in Baltimore, Maryland. As pointed out in the Hearing Officer's Report, Goucher is engaged in providing higher education services and is primarily an undergraduate liberal arts college with about 1,500 undergraduate students. It offers some graduate and teaching programs. Goucher employs approximately 135 full-time faculty and 90 part- and half-time faculty. A number of faculty at Goucher are non-tenure or non-tenure-track, meaning that they have no expectation for tenure and do not participate in faculty governance, but are engaged to teach courses at Goucher on either semester or yearly contracts. In addition, Goucher from time to time engages adjunct faculty on a purely temporary basis, usually to temporarily replace faculty who are on leave. All of the individuals discussed in Section III below fall under this latter category.

## **III. THE EMPLOYER'S CHALLENGES**

The basis for all of Goucher's challenges is the same: the individuals were hired as visiting/replacement faculty. They all were appointed on a temporary basis, often to fill in for a professor on leave. All of them knew this at the inception of their employment. Thus, and for

the reasons discussed below, the Hearing Officer erred in failing to recommend that the following challenges be sustained and that those individuals' ballots not be counted.

**A. The Hearing Officer Erred in Recommending That the Challenge to Joseph Briggs' Ballot Be Overruled and That it Be Opened and Counted (Exceptions 3-6, 22).**

The Hearing Officer incorrectly concluded that Joseph Briggs has an expectation of continued employment at Goucher, stating, without any basis, that "it is not unreasonable to deduce that he may again be offered a contract of employment for the fall 2015 semester." (R., p. 9). This is pure speculation on the part of the Hearing Officer, and is not supported by any record evidence.

Rather, the record bears out the following facts: Goucher hired Briggs as a temporary replacement for Professor Scott Sibley, who had a light course load in the fall 2014 semester. (Tr., p. 55). Briggs was engaged to teach only the Chemistry 112 course for that semester. *Id.* Moreover, Briggs had never been employed by Goucher prior to fall 2014. (Tr., p. 62). Briggs' appointment letter for this temporary appointment made clear the offer was contingent on the unavailability of a professor to teach the course (that is, it would have left no doubt in Briggs' mind that he was a leave replacement). (Empl. Exh. 7, p. 3). Because Briggs' appointment was temporary and of finite, limited duration, the letter was silent as to the possibility of contract renewal. *Id.* Briggs was offered a second temporary, visiting faculty appointment for the spring 2015 semester only, as a replacement for Professor Kevin Schulz, who is on sabbatical leave. (Tr., p. 55). Like his first appointment letter, his second letter makes clear that the engagement is contingent upon the unavailability of a professor to teach the course. (Empl. Exh. 7, p. 1). Again, because he was being hired as a temporary leave replacement, the letter says nothing regarding the possibility of contract renewal (because there was no such possibility). *Id.*

Provost Marc Roy testified that the college has no plans to employ Briggs beyond the spring semester of 2015. (Tr., p. 55). The Union called Briggs to testify, and he admitted on cross-examination that he had had no conversations with Goucher about teaching beyond spring 2015, that he has not discussed employment in the future with the chairs of the Chemistry and Biology departments, and that he will not be employed at Goucher in the fall of 2015. (Tr., pp. 145, 149, 150). The Faculty Appointment Authorization form completed by the Chemistry Department indicates that Briggs was being employed as a leave replacement for the spring 2015 semester. (Empl. Exh. 7, p. 2).<sup>2</sup>

There simply is no question but that Briggs' two semester appointments were temporary, and that he was engaged in both instances as a leave replacement. Briggs himself admitted in his testimony that he had had no discussions about further employment with Goucher and that he is not going to be employed by Goucher after the spring 2015 semester. It is unclear how the Hearing Officer could have concluded based on this record that Briggs has any expectation (much less a reasonable expectation) of continued employment, when he testified himself to the contrary. (R., p. 9). In fact, the basis for the Hearing Officer's recommendation to sustain the challenges to the ballots of Prince and Ozdemir was the fact that these employees had one-semester appointments. Likewise, Briggs also had a one-semester appointment. Thus, under the Hearing Officer's own reasoning the challenge to Briggs should also be sustained.

For the foregoing reasons, the Hearing Officer's reliance on *University of Vermont and State Agricultural College*, 223 NLRB 423 (1976) and *Rensselaer Polytechnic Institute*, 218 NLRB 1435 (1975) was erroneous. Those (and similar) Board cases dealt with adjunct faculty

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<sup>2</sup> Employer's Exhibit 7, page 2 is an example of a "Part-Time Faculty Appointment Authorization form," which is completed by a department chair when the department seeks to hire a part-time faculty member. (Tr., p. 58). It provides space to indicate whether the faculty member being hired is, or is not, being hired as a leave replacement.

on terminal contracts who were not explicitly hired to be replacements for a finite term, and whose employment status was left uncertain when it began.

The cases relied upon by the Hearing Officer do not stand for the proposition that a temporary replacement faculty somehow stands in the shoes of all adjunct faculty generally. The cases upon which she relied involve adjuncts whose employment status remained open-ended and uncertain at its inception and as of the eligibility date. This is not the case for Briggs (or any other of Goucher's challenges).

The correct legal standard is the Board's test for temporary employee eligibility in an election. In such cases, the Board "examines whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event..." *Marian Medical Center*, 339 NLRB 127, 128 (2003) (challenged voter lacked community of interest where he was assigned to work at voting location of employer and employer planned to hire permanent employee in near future when renovation project was complete); *Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1979) (voters excluded where hired for one summer without expectancy of continued employment); *FWD Corp.*, 138 NLRB 386, 390 (1962) (voter excluded where he was 6-month temporary training assignment to unit location); *Irwin & Lyons*, 51 NLRB 1370, 1373 (1943) (employees excluded where transferred from one logging camp to another during temporary shutdown). Under this standard, Briggs was a temporary employee, and this fact was known from the outset of his employment. His ballot therefore should not be counted.

**B. The Hearing Officer Erred in Recommending That the Challenge to Jeffrey Dowd's Ballot Be Overruled and That it Be Opened and Counted (Exceptions 7-11, 22).**

The Hearing Officer erred in concluding that Jeffrey Dowd's employment end date "was not set in stone" before the eligibility date in this case. (R., p. 10). It is unclear how she could have reached this conclusion; the Report itself acknowledges that Dr. Jamie Mullaney, the Department Chair of the Sociology and Anthropology Department, testified that the professor for whom Dowd is a replacement, Dr. Raj Goshal, is returning to Goucher, and Dowd will no longer be needed after the spring 2015 semester. (R., p. 10). Goucher established the following facts at the hearing of this matter. Dowd was offered a temporary appointment at Goucher for the 2014-2015 academic year only. (Tr., pp. 38-39). He had no prior history teaching at Goucher. *Id.* Mullaney testified that Dowd was hired to teach Goshal's courses as a replacement while Goshal was on sabbatical. (Tr., p. 20; Empl. Exh.2). Goshal is returning in fall 2015. (Tr., p. 62), so Dowd will not be re-appointed or otherwise work at Goucher beyond spring 2015. (Tr., p. 35).<sup>3</sup>

The above testimony is supported by the documentary evidence and is uncontradicted in the record. Dowd's appointment letter, an e-mail from Roy confirming the offer, the Payroll Authorization form for the position, and the candidate offer form all indicate that he was being offered an appointment as visiting professor for one year, with the possibility of renewal for a second year. (U. Exh. 1; Tr., p. 54; Empl. Exh. 5, Empl. Exh. 6). The Payroll Authorization form identifies Dowd as a "one-year leave replacement." (Empl. Exh. 5).

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<sup>3</sup> At the time Dowd was hired, another member of the department, Professor Janet Shope, was teaching fewer courses in the department because she was also serving in an administrative capacity at the college. (Tr., pp. 32-33; Empl. Exh. 2). Shope does not teach the same courses as Goshal. Dowd inquired as to the possibility of continuing on to teach Professor Shope's courses in the 2015-2016 academic year, but has been told that he was unqualified. (Tr., pp. 20-21).

The Hearing Officer erroneously concludes that Dowd was told of a “possibility of renewal” of his contract, so he is not a temporary replacement. (R., p. 10). There was no possibility of “renewal” on an open-ended basis; rather, Dowd was hired on a one-year basis as a leave replacement with the possibility of a one-time-only renewal for a second year. Thus, Dowd stands quite apart from faculty whose contracts may or may not be renewed into the future. Even if he had been renewed for the 2015-2016 academic year, that would have been the end of his employment. Professor Dowd has been informed that he is not being renewed for that year and that a national search will be conducted for the vacancy in the department. (Tr., p. 32). Thus, from the outset Dowd’s employment end date was reasonably certain: it would have come either at the end of the 2014-2015 year or the 2015-2016 year; he knew for certain that his employment had no chance of continuing beyond that date. The Hearing Officer incorrectly concluded that Dowd had an expectation of continuing employment; the record evidence establishes conclusively that his employment was on a temporary basis. For the foregoing reasons, he was a temporary employee within the meaning of *Marian Medical Center, supra*, and other cases cited in Section III.B.

**C. The Hearing Officer Erred in Recommending That the Challenge to Madeline Fairbairn’s Ballot Be Overruled and That it Be Opened and Counted (Exceptions 12-13, 22).**

The Hearing Officer found that Madeleine Fairbairn’s ballot should be counted because the unit specifically includes post-doctoral teaching fellows. (R., p. 11). She engaged in no further analysis on Fairbairn’s eligibility *vel non*. At the hearing, Goucher adduced the following evidence regarding Fairbairn. She is a postdoctoral fellow and is supported by a grant that funds the position for a maximum of two years. (Empl. Exh. 8; Tr., p. 63). The appointment is wholly contingent on grant funding being available in the second year; Roy put Fairbairn on notice of

this fact via e-mail. (Empl. Exh. 8, pp. 1-2). Fairbairn's appointment letter, like Dowd's, makes clear that there is a possibility of renewal, but only for a second year. (Empl. Exh. 8, p. 4; Tr., pp. 63-64). The Faculty Payroll Authorization form and Candidate Offer Form clearly identify Fairbairn as a post-doctoral fellow with a one-year appointment. (Empl. Ex. 8, p. 5; Ex. 9; Tr. at 67). Fairbairn's employment will terminate at the end of the 2015-16 academic year; there is absolutely no chance that it will be renewed. (Tr., p. 64). All of this evidence went unrebutted.

Simply put, the Hearing Officer's conclusion as to Fairbairn is inconsistent with the reasoning contained elsewhere in her Report. She reasoned earlier in the Report that Board precedent required her to assess, on a case by case basis, whether each faculty member should be included in the unit. (R., p. 8). Indeed, after such an analysis she correctly recommended that the challenges to adjunct faculty Ozdemir and Prince be sustained and that their votes not be counted. (R., p. 12). But she then reasons that because "post-doctoral fellows" are included in the unit description, that should be the end of her inquiry as to Fairbairn. (R., 11). This reasoning is internally inconsistent; the unit description explicitly includes "non-tenure-track faculty"; however, that does not mean that any individual who is a non-tenure-track faculty automatically is eligible to vote. The Hearing Officer recognized this by analyzing whether each of Goucher's challenges was "temporary" as defined by Board law. Likewise, she should have performed the same analysis with respect to Fairbairn, rather than automatically declaring her eligible to vote because of her title.

In addition, the because the record evidence establishes that Fairbairn's employment was, from its inception, limited to no more than two years, the Hearing Officer erred in failing to sustain Goucher's challenge to her ballot based on the reasoning of *Marian Medical Center*, *supra*, and other cases cited in Section III.B.

**D. The Hearing Officer Erred in Recommending That the Challenge to Daniel Kimball's Ballot Be Overruled and That it Be Opened and Counted (Exceptions 14-17, 22).**

The Hearing Officer erred in failing to consider the fact that Daniel Kimball's position is being eliminated as of the end of the 2014-2015 academic year. (R., p. 11). Rather, she erroneously relied on the fact that Kimball might later be hired in a tenure-track position (outside of the bargaining unit). (R., p. 11). The important fact, ignored by the Hearing Officer, is that Kimball knew going into his appointment that the position he was filling was being eliminated. He therefore knew that he would not be employed in that position in the future.

Goucher adduced the following evidence at the hearing. Kimball was given an appointment as a full-time, non-tenure-track faculty in the Department of Communication and Media Studies. Roy testified, without contradiction, that he interviewed Kimball and explained to him at the time of his hire that the position he held would be discontinued after the academic year. (Tr., pp. 69-70). Kimball knew this when he was hired. *Id.* The position will no longer exist, because the Department is converting the position into a tenure-track position for the 2015-2016 academic year. *Id.* This conversion is documented in the department's request to the Provost for such position. (Empl. Ex. 16; Tr., p. 87). As with the other challenges, Professor Kimball's letter does not state that there is a possibility of contract renewal (because there is no such possibility). (Empl. Ex. 10). Kimball has applied for the tenure track position. *Id.*

The Hearing Officer erred here by looking only at the fact that Kimball "might" be hired into a tenure track position, which is specifically excluded from the unit. (R., p. 11). Therefore, the Hearing Officer's reliance on *Personal Products Corp.*, 114 NLRB 959, 961 (1955) is misplaced. That case stands for the proposition that where an employee announces during the "critical period" that he will leave the bargaining unit after the election, he is eligible to vote.

The reasoning in that case would be applicable only if Kimball were hired on the same basis as all other adjunct faculty, then decided at a later date (but before the election) to leave for a tenure-track position. That is not what happened here. Regardless of whether Kimball is hired into a tenured position, the fact is that he knew at the inception of employment that his employment as a non-tenure-track faculty member was temporary because the job was being eliminated. *Personal Products Corp.* is distinguishable on this basis.

Because Kimball knew at the inception of employment that he would not continue as a non-tenure-track faculty after the 2014-2015 academic year, under the reasoning of *Marian Medical Center, supra*, and other cases cited in Section III.B., his employment was temporary and his ballot should not be counted.

**E. The Hearing Officer Erred in Recommending That the Challenge to Jay Thompson's Ballot Be Overruled and That it Be Opened and Counted (Exceptions 18-22).**

The Hearing Officer's conclusions as to Jay Thompson were erroneous. Goucher adduced the following evidence at the hearing. Thompson was engaged as a visiting professor on a temporary basis to teach the Business 206 course during the fall 2014 semester. (Tr., p. 81). Thompson's July 1, 2014, appointment letter for this limited engagement states that the offer is contingent on the unavailability of a professor to teach the course. (Empl. Exh. 15, p. 1). It also is silent on the possibility of contract renewal, because the appointment was of finite, limited duration. *Id.* After the semester, this course will in the future be taught by a full-time instructor, Phaye Poliakoff Chen; this was communicated to Thompson at the inception of his employment. (Tr., pp. 82, 121-122).

On December 9, 2014, Goucher offered Thompson a second temporary, visiting faculty appointment for the spring 2015 semester teaching the English 105 course. (Empl. Ex. 15, p. 3).

Like his first appointment letter, his second letter makes clear that the engagement is contingent upon the unavailability of a professor to teach the course. *Id.* As described by Poliakoff-Chen, the new director of the Writing Program, that program is being reorganized beginning with the 2015-16 academic year. (Tr., pp. 121-122). As described in the Writing Program proposal, which will be implemented in fall 2015, only full-time and half-time faculty will be used. (Empl. Exh. 20, last page; Tr., pp. 83, 125-126). The reorganization decision was made in the spring of 2014, well before Thompson was hired to teach in the program. (Tr., pp. 131-132). Poliakoff-Chen told Thompson about the reorganization of the Department and the elimination of part-time faculty. (Tr., pp. 123-124). Thus, each of the two times Thompson has been engaged, his appointment has been limited in duration; both he and Goucher knew at the inception of employment that it was for a temporary period, that it would be ending, and when it would be ending. In this regard, Thompson's one semester employment terms are the same as those of Prince and Ozdemir. The Hearing Officer's reasoning supporting her recommendation to sustain the challenges to the ballots of Prince and Ozdemir should apply to Thompson's ballot.

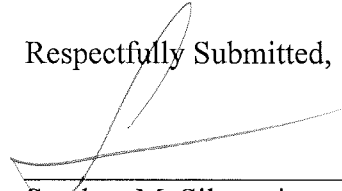
The Hearing Officer erroneously concluded that Thompson was told after the eligibility date that the Department was being reorganized. (R., p. 13). There is no support for the Hearing Officer's conclusion on this point. In fact, the record evidence shows that Thompson knew that his appointment at Goucher was temporary, and he knew this from the outset. Thus, under the reasoning of *Marian Medical Center, supra*, and other cases cited in Section II.B., his employment was temporary and his ballot should not be counted.

#### **IV. CONCLUSION**

For the foregoing reasons, and as stated in the Employer's Exceptions, Goucher respectfully requests the foregoing Exceptions to the Hearing Officer's Report on Challenges be

sustained, and that the Board order that the ballots of Briggs, Dowd, Fairbairn, Kimball and Thompson not be opened and counted.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read 'Stephen M. Silvestri', is written over a horizontal line.

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